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No. 2738

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

WILLIAM A. MAHAFFEY,
Defendant,

NELSON COOPER,
Appellee.

BRIEF OF APPELLEE
NELSON COOPER.

JAMES A. WALSH,
Solicitor for Appellee.

STATE PUBLISHING CO., HELENA, MONT

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STATEMENT.

This action was prosecuted by the Appellant against William A. Mahaffey for the purpose of cancelling a patent to certain lands.

The bill of complaint contains the stereotyped allegations in such cases, alleging that Mahaffey on April 27th, 1899, made a homestead entry upon the lands in question, (Tr. p. 3), and that on the 23rd day of June, 1904, he made final proof, and on the 31st of December, 1904, a patent was issued to him. (Tr. pp. 8-9.) Mahaffey could not be found within the jurisdiction of the Court,

and thereupon an affidavit for an order of publication was made and filed (Tr. pp. 18-19-20) and an order was issued and served by publication. (Tr. pp. 21-22-23.) An order was entered against him pro confesso, (Tr. 24-25.)

The appellee filed a Petition in Intervention, (Tr. pp. 25-29) and was allowed to intervene. Thereupon the intervenor filed his answer in which he denied the general allegations of fraud contained in the complaint, (Tr. pp. 31-33) and further answering alleged that after the making of said final proof by Mahaffey, the appellee in good faith, and without any notice or information that Mahaffey had not complied with the laws of the United States, and for a valuable consideration paid by him purchased the said lands from the said Mahaffey, and a deed of conveyance was executed, conveying said lands to the appellee; that said deed was executed and the money paid in good faith, and that he did not have any notice that Mahaffey had not complied with the law, or that the complainant claimed that any fraud had been committed by said Mahaffey. (Tr. 33-34.)

The cause was tried before the Court, and the Court rendered a memoranda opinion, to which we would call the special attention of this Court, (Tr. pp. 38-42) and thereupon a judgment and decree was entered, dismissing the suit.

ARGUMENT.

There are only two questions presented in this case, viz: First: Did Mahaffey commit a fraud in procuring title to this land? and Second: Is the appellee an innocent purchaser in good faith, for value and without notice?

These are questions of fact. It may be said that there is not an issue of law involved in the case. The Judge who tried the cause, who saw the witnesses, heard their testimony, the manner in which they testified, and observed their demeanor on the stand, had a better opportunity to judge of the character and credibility of the witnesses than the Appellate Court has, who only has the printed transcript before it.

The homestead entry was made in April, 1899, and final proof was made in June, 1904. The witness Bennett did not see the land until 1909, five years after Mahaffey made final proof. His testimony can have but little weight and in fact does not very materially contradict the testimony of the witnesses on the final proof. (Tr. pp. 54-55-56.)

W. L. Kinsey and his son, Frank Kinsey never saw the land until 1904. It is apparent that the elder Kinsey is an amateur detective, and shows the special Agents of the Government around, keeps them at his place, and hires them his teams to use to look over lands. (Tr. p. 55.) Furthermore he had occasion to be active against Mr. Cooper because they "ranged him out." (Tr. p.

48.) His son, Frank Kinsey, did not become acquainted with the land until 1904, and he attempts to corroborate the testimony of his father.

The other witnesses by whom the Government sought to maintain its case were John Gardipee, Sr. and his son, John Gardipee (half Indian) Jr. Their testimony is to the effect that they never saw Mahaffey on the land, but they did not know the land prior to 1902. Their testimony is negative in character. It is unnecessary to follow the testimony of Appellant's witnesses and I will only quote the words of Judge Bourquin who heard these witnesses testify: "Such witnesses should not be used by any one, especially by the Government."

Turning now to the testimony of the appellee; His father, Frank D. Cooper, is a man of some standing in the community in which he lives, has been a member of the Legislature, and a County Commissioner of one of the most populous and wealthy counties of the State, Cascade County. He saw Mahaffey on the land in 1900. He was in the cabin and saw such furniture as is usually in a bachelor's quarters. He was there on horseback and went in to light his pipe. There was a board roof, and a floor in the house, and he sold Mahaffey forty rods of his fence to be used in inclosing the land. There was a reservoir and a ditch on the place. This land was about seven or nine miles west of Cooper's home, and Cooper saw Ma-

haffey frequently passing, going to and returning from the direction of this land. (Tr. 74.)

Nelson Cooper, the Appellee, who was at that time a mere boy, was acquainted with Mahaffey. He knew that there was a reservoir on the place, and the boys used to go there to swim. (Tr. pp. 88-89.)

William Kirkland, who had charge of one of Cooper's outfits, knew the land; the house was plastered; he saw a stove pipe through the roof, and saw the reservoir and a ditch, and saw a fence on the east side. (Tr. p. 91.) Mahaffey worked for Kirkland a short time in the spring of 1904. He hired him and paid him off. (Tr. p. 92.) If he wanted he could go to his place nights and return in the morning, and he noticed him passing to and from his place. (Tr. p. 92.)

The Government attempts to bolster up its case by trying to show that Mahaffey worked for Cooper, but this is mere hearsay, or was evolved in the brain of some of the witnesses. Cooper denies that he worked for him, and Kirkland shows that he only worked a short time in 1904. It is shown by the testimony of Loss that whatever work Mahaffey did was on the N. S. Ranch. (Tr. 94.)

Loss was on the land, saw a cabin "daubed or pointed as they call it," with a board roof, and saw a stove pipe through the roof and a door and window in the house. There was a reservoir and ditch there. It was as good as the ordinary

homestead in Montana. Mahaffey stayed on the ranch and took care of stock in the winter. He was considered a pretty good man, (Tr. 94-95).

Charles Wise was on the place and saw the log cabin. It had a door and window. He stayed there four or five days, and ate and slept there. Mahaffey had a bed, table and one chair, and a place fixed up for dishes, bachelor-like. The cabin was plastered, and there was a stove pipe through the roof. There was a corral there, and he helped to build the reservoir. (Tr. pp. 96-97.) Wise is an old man, and in cross-examination got a little mixed on his dates and said he did not know the year it was, but thought it was 1905. It is clear that Mahaffey did not build the reservoir after he had made final proof and sold the land; and that it was prior to that date that Wise helped him build it, and stayed on the place with him.

It is thus shown by positive testimony that Mahaffey did comply with the provisions of the Homestead Act. This testimony is sought to be overcome by the testimony of Bennett, who never saw the land until 1909; the testimony of the two Kinseys who never saw the land until 1904, and who only testified that they never saw Mahaffey on the land; and the testimony of Gardipee and son who never saw the land until 1902, and whose testimony is merely negative. The testimony of such witnesses, with their limited chances for observation, is not entitled to any weight.

The Government has signally failed to estab-

lish its allegations of fraud. The testimony of its witnesses, witnesses who are not entitled to much credit, is negative in its character. As the Court said: "Their testimony is negative; their opportunities for observation few; their recollection poor; their testimony hesitant and drawn out, modified, strengthened and shaped by leading questions. Little credibility and weight can be given it in the main." (Tr. p. 39.)

I regret that I did not insist on having the entire testimony, question and answer, incorporated in the bill of exceptions so that this Court might see the labored efforts of Counsel to bring out the testimony of the witnesses to sustain their case.

The Appellant failed to establish fraud by clear and convincing evidence that is required in such cases.

> "Parties are presumed to be free from fraud until the contrary is proved, and the burden rests upon him who asserts fraudulent conduct, to make good the charge by *clear and satisfactory proofs.*"
>
> Jones on Evidence, 192.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

> "We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves

the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the Government of the United States under its official seal. In this class of cases, the respect due to a patent, the presupmtions that all the preceding steps required by law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this it attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the Government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of succesful resistance to the whims and caprices of every person who chooses to attack them in a court of justice: but it should be well understood that only that class of evidence which commands respect and that amount of it which produces conviction, shall make such an attempt successful."

This language was quoted with approval in the case of United States vs. Budd, 144 U. S. 154.

Applying this test, the complainant's testimony falls far short of making out a clear and convincing case of fraud.

In United States vs. Stinson, 197 U. S. 200, the Court said:

> "While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to a patent,—the presumption that all the preceding steps required by law have been observed before its issue. The immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside and annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof."
>
> "Second. The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' "
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> Further:
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> "But it is not such a fraud as prevents the passing of the legal title by the patents. It follows that, to a bill in equity to cancel the patents upon these grounds alone, the defense of a bona fide purchaser for value, without notice, is perfect."

These quotations are supported by numerous decisions of United States Supreme Court cited in

the original opinion, which we think unnecessary to cite here.

In the Maxwell Land Grant case, 121 U. S. 325, the Court said:

> "The deliberate action of the tribunals to which the law commits the determination of all preliminary questions, and the control of the processes by which this evidence of title is issued to the grantee, demands that, to annul such an instrument, and destroy the title claimed under it, the facts on which this action is asked for must be clearly established by evidence entirely satisfactory to the court, and that the case itself must be entirely within the class of causes for which such an instrument may be avoided."

See also Colorado Coal & Iron Company vs. United States, 123 U. S. 307.

THE APPELLEE IS A PURCHASER IN GOOD FAITH, FOR VALUABLE CONSIDERATION, AND WITHOUT NOTICE.

The Appellee was twenty-three years old at the time of the trial of this case. (Tr. p. 88) He was, therefore, twelve years old at the time this land was bought.

The Appellee was named after H. H. Nelson, one of Cooper's neighbors, who gave him One hundred Dollars, ($100.00), (Tr. p. 78). This money was used and calves bought with it at times, and at this time Nelson had to his credit from that money, the sum of about Three Hundred Dollars, ($300.00) (Tr. p. 79). Nelson made One hundred Dollars at one time in buying some calves. (Tr. p. 89.)

The elder Cooper met Mahaffey at Cascade, and Mahaffey wanted to sell the land to Nelson (Tr. p. 76). Mahaffey and the boy were "chummy," and it is not unreasonable to suppose that Mahaffey wanted the boy to have the land. (Tr. p. 88.) Mahaffey wanted Three hundred fifty Dollars, ($350.00) for the land, and wanted to sell it to Nelson. They finally agreed upon Three hundred Dollars, ($300.00) and Mahaffey was given a check for that amount, (Tr. p. 76) and a deed of conveyance was executed. That is all the land was worth. Cooper had bought a considerable quantity of Northern Pacific land for One dollar and a quarter, ($1.25) an acre, of the same character as the Mahaffey land, and all around in that locality. The Mahaffey land was in a little canyon, rocky on both sides and would not average as good as the railroad land bought at $1.25 an acre, and the Mahaffey land was not worth more than Three hundred Dollars. (Tr. p. 77.) The Government did not attempt to prove that the land was worth any more, so that it is conclusively proven that appellee paid all the land was or is worth.

It is contended that the elder Cooper had notice that Mahaffey had not complied with the law. But this evidence is negative in its character and the testimony of "such witnesses" as "should not be used by any one, especially not by the Government," and even this testimony was "drawn out, modified, strengthened and shaped by leading

questions." The witnesses were willing to testify, but they did not know just what testimony was needed.

What is the evidence to show that the elder Cooper had any knowledge that Mahaffey had not complied with the law?

Kinsey said that Mahaffey worked for Cooper, but he only knew what he heard (Tr. p. 46) and that Cooper's place was four miles southeast from Mahaffey's place (Tr. p. 46).

Gardipee Sr. (erroneously spelled "Gardispee" in the transcript) did not testify as to any knowledge on the part of Cooper. Neither did Gardipee Jr.; Bennett knew nothing about it, nor did Kinsey Jr.; so there is no evidence whatever to show that Frank D. Cooper had any knowledge of the conditions of the land at the time he bought it, or that Mahaffey had not, in all things complied with the law, or that it was claimed on the part of the Government that he had not. In fact it is shown affirmatively that the elder Cooper acted in good faith and that he paid all the land was worth.

The quotation from 220 Fed. 871, on page 30 of Appellant's brief does not touch the issues in this case. As I stated, there is practically no question of law involved. It is a question of fact and the quotation made does not fit the facts in this case.

The appellant has proved that he purchased the land in good faith; that he had no notice of

fraud or claim of fraud on the part of Mahaffey; he proved that he paid value, Three hundred Dollars; he proved that the land was not worth any more, and that lands all around it, better lands, had been purchased for less money.

The Appellant did not attempt to rebut or discredit this testimony, and did not introduce any evidence whatever upon the subject. Therefore it must be taken as true that the land is not and was not worth any more, and it is proved beyond a question that Cooper paid Three hundred Dollars for the land.

The fact that the elder Cooper may have had some sheep pens some place near this land is not proof that he knew of the conditions of this land, if the conditions claimed by the Appellant existed. The elder Cooper is a man of large affairs. He does not look after all details of his business personally. The witness Kirkland had charge of the sheep camp in that vicinity, and there is not one scintilla of proof showing or tending to show that Cooper ever was at that sheep camp, or that he had any knowledge of the condition of the Mahaffey land, excepting what is shown by his own testimony.

The evidence that Mahaffey worked for Cooper is so flimsy and unreliable that it is difficult to discuss it with patience. The testimony of Kirkland is conclusive on that point; that Mahaffey worked under Kirkland's supervision a short

time in the spring of 1904 (Tr. p. 92). It is quite probable he reported that to Cooper when he settled with Cooper, but Cooper did not testify that he knew anything about that.

The testimony of Frank Kinsey was that Mahaffey worked for Cooper in the spring of 1904 "I think", he does not say how long. In fact he did not know.

Gardipee only knew what he heard. (Tr. p 46.) John Gardipee Sr. says he saw him working for Cooper about three miles from the Mahaffey place. (Tr. p. 50.)

And this is the kind of flimsy evidence that the Government would use, and upon which it bases its claim to take this land away from this boy.

It is contended that F. D. Copper was the agent of the Appellee Nelson Cooper. Nelson Cooper was eleven or twelve years old at the time the land was purchased, and was legally incapable of employing an agent or being bound by his acts.

It is not necessary to cite authorities in support of this proposition. It is elementary.

Mahaffey left the country and his present residence is unknown.

If this patent is cancelled, Nelson Cooper will lose the land, will lose his money and Mahaffey cannot be found so that Nelson will not have recourse on anybody to recover the money paid for the land.

It may be contended that he might recover it from F. D. Cooper. Under the evidence in this case, I contend that he cannot.

However, it is not necessary to discuss that question in this case.

I respectfully submit that the Appellant has failed to establish any fraud on the part of Mahaffey, and as to the witnesses, "Their testimony is negative, their opportunities for observation few, their recollection poor, their testimony hesitant and drawn out, modified, strengthened and shaped by leading questions. Little credibility and weight can be given it in the main." "Such witnesses should not be used by any one, especially not by the government."

On the contrary, the testimony of the appellee's witnesses, witnesses who have some standing in the community in which they live, men of families, is positive and direct, and shows that no fraud was commited by Mahaffey; that he acted in good faith, and "was considered a pretty good man in the community."

The Appellee assumed the burden of proof, and established by undisputed evidence that he was a purchaser of the land in good faith, without notice of any fraud on the part of Mahaffey or claim that he had committed fraud; and that he paid in money, or by check, which is the same as money, the full value of the land.

I respectfully submit that the judgment of the

lower Court is in all things correct, and is supported by evidence beyond a reasonable doubt, and should be in all things affirmed.

Respectfully submitted,

JAMES A. WALSH,
Solicitor for Appellee.